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IN THE

Supreme Court of the United States

OCTOBER TERM, 19.....

No.....

A. T. GARRETT, W. D. WALTERS
AND J. B. MCDANIEL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 2, 1969. Petition for rehearing was denied on January 19, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals which incorporates the opinion of the District Court in its entirety is reported at ____ F.2d ____ and is printed in Appendix A, *infra*, pp. 1a-8a. The opinion of the District Court is reported at 296 F.Supp. 1302.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1969. (R. Vol. III, p. 5); Appendix A, *infra,* page 9a). Rehearing was denied on January 19, 1970, without opinion. (R. Vol. III, p. 6). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Federal Aviation Administration may delegate to air carriers the authority to promulgate procedures which have the force and effect of rules or regulations issued by the Administrator under the Federal Aviation Act of 1958 (49 U.S.C., Sections 1301 et seq.) so as to subject airmen to civil penalties under 48 U.S.C., Section 1471, for violation of maintenance procedures established by air carriers and never approved by the Administrator.[1]

STATUTES INVOLVED

The statutes involved are Sections 601, 609 and 610 of Title VI and Sections 901 and 903 of Title IX of the Federal Aviation Act of 1958. 72 Stat. 775, 779, 780, 783 Title VI and Sections 901 and 903 of Title IX of the

[1] Public Law 89-670, Oct. 15, 1966 (80 Stat. 931, et seq; 49 U.S.C., Sections 1651 through 1659) created the Department of Transportation and transferred the Federal Aviation Agency, renamed Federal Aviation Administration, to that Department. The duties of the Administrator of the Federal Aviation Agency under Title VI of the Federal Aviation Act were continued in him as Administrator of the Federal Aviation Administration and the quasi-judicial duties of the Civil Aeronautics Board under Title VI were transferred to the National Transportation Safety Board. Substantive provisions of the Federal Aviation Act and of the regulations issued under the Act have continued, unchanged.

and 786; 75 Stat. 467; 76 Stat. 149; 49 U.S.C., Sections 1421, 1429, 1430, 1471 and 1473. They are printed in Appendix B, *infra*, pages 11a through 19a.

STATEMENT

Petitioners are mechanics employed by Eastern Airlines, an air carrier. The United States brought separate actions against them and another mechanic, W. F. Petsch, to recover civil penalties under 49 U.S.C., Section 1471(a), for the alleged failure to follow maintenance procedures established by Eastern in the assembly of a propeller. Failure to follow "approved" maintenance procedures was charged to be a violation of Section 43.13(c) of Federal Aviation Regulations [14 C.F.R., Section 43.13(c)][2] and consequently a violation of 49 U.S.C., Section 1430(a)(2). (R., Vol. I, 1 through 7). The four separate actions were consolidated for trial. (R. Vol. I, p. 14, 16). In its post-trial brief filed with the District Court, the Government withdrew its case against Petsch. (R. Vol. I, p. 448). Petitioners were found guilty and a civil penalty of $100.00 was imposed on each. (R. Vol. I, 458).

49 U.S.C., Section 1471, provides that any person who violates any provision of Title VI (safety provisions) of the Federal Aviation Act or "any rule, regulation or order issued thereunder" shall be subject to a civil penalty not to exceed $1,000 for each violation. Jurisdiction is given to the district courts to impose civil penalties at the instance of the United States Attorney by 49 U.S.C., Section 1473.

49 U.S.C., Section 1430(a)(2) provides that it shall be unlawful: "For any person to serve in any capacity as an

[2] Pertinent provisions of Regulations are reprinted in Appendix C, *infra*, pages 20a through 29a.

airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce . . . in violation of any order, rule, or regulation issued under this Title (Title VI - Safety Regulations of Civil Aeronautics)." (Parenthetical explanation supplied.)

Section 43.13 of Federal Aviation Regulations (14 C.F.R. 43.13) provides that each person maintaining civil aircraft shall use methods, techniques and practices "acceptable to the Administrator." Section 43.13(c) provides:

> *"Special provisions for air carriers and commercial operators.* Unless otherwise notified by the Administrator, the methods, techniques and practices contained in the maintenance manual or in the maintence part of the air carrier manual of a certificated air carrier or commercial operator (that is required by its operating certificate or approved operating specifications to provide a continuous airworthiness, maintenance and inspection program) constitute acceptable means of compliance with this Section."

The substantance of the charge against petitioners, therefore, was that they were liable for a civil penalty because of their alleged failure to follow an "approved" maintenance procedure established by Eastern Airlines. (Complaints, Par. V; R. Vol. I, 2, 4, 6).

49 U.S.C., Section 1421 provides:

> *"General Safety Powers and Duties.* — (a) *Minimum Standards — Rules and Regulations.* — The Administrator is empowered and it shall be his duty to promote the safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> ". . . .
>
> "(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing and overhauling of air-

craft, aircraft engines, propellers and appliances; (B) the equipment and facilities for such inspection, servicing and overhauling; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhauling shall be made, including provision for examination and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

". . ."

Petitioners defended with contentions that:

(1) The District Court was without jurisdiction to impose a civil penalty for the alleged violation of a repair procedure established by an air carrier because the statute (49 U.S.C., Section 1371) provides for civil penalties only for violations of the Act or of a "rule, regulation or order issued thereunder"; and the Administrator was without authority to delegate the rule making authority to an air carrier;

(2) That the repair procedure established by Eastern was (a) not contained in the maintenance part of Eastern's air carrier manual and had not been "approved" and (b) even if it had been in the manual, the repair procedure was inadequate to prevent errors in the assembly of the propeller in question and the error which occurred could have occurred even though the procedure was followed;

(3) That petitioners followed the prescribed procedure; and

(4) That an administrative disciplinary procedure is provided by 49 U.S.C., Section 1429, whereby the Administrator may amend, suspend or revoke airmen's certificates, subject to review *de novo* by the Civil Aeronautics Board

(now the National Transportation Safety Board) with review in the Circuit Courts of Appeal, and that it is the intent of the Act that technical matters such as maintenance procedures, especially those established by air carriers and not by rule or regulation of the Administrator, shall be supervised and enforced by especially qualified administrative and quasi-judicial authorities rather than the courts, and that the district courts therefore are authorized to enforce only rules and regulations issued by the Administrator himself. (R. Vol. I, 17 through 20).

Petitioner Garrett, who was a lead mechanic and whose only function in connection with the assembly of the propeller in question was to assign competent personnel to its assembly[3], contended that neither the law nor rule of the F.A.A. authorizes the imposition of a civil penalty on a person who is prevented by other duties assigned to him by the air carrier from participating in, and from supervising, the assembly.

Eastern Airlines has its principal repair facility in Miami, Florida, with outlying repair bases, including that at Atlanta where petitioners are employed. (R. Vol. I, 246). Ordinarily, the maintenance and repair procedures recommended by the manufacturer of an aircraft or of aircraft components are approved and required to be followed by the Administrator (R. Vol. I, 265-268) and are contained

[3] There was no contention that Petsch, McDaniel and Walters were other than competent. The uncontradicted evidence shows to the contrary and that all have advanced in their employment status since the propeller incident. In fact, Petsch was advanced to the supervisory position of shift foreman and Walters, an electrician, was certificated as a mechanic by the Administrator while these cases were pending against them in the District Court. (R. Vol. I, 331, 342.)

in the air carrier's maintenance manual. At one time, when Eastern performed all of its aircraft maintenance in Miami, this was the case with Eastern (R. Vol. I, 246); but Federal Aviation Regulations do not require an air carrier to maintain its complete maintenance manual at every repair base. An outlying repair base is required to maintain only those portions of the maintenance manual which describe the repair functions which are performed at their base. Regulations, Sections 121.135(b)(16) and (c); 14 C.F.R., Sections 121.135(b)(16) and (c). The maintenance manual of Eastern at the principal repair base in Miami contains a complete description of the procedures to be followed in overhauling and reassembling Electra propellers. However, in 1960 Eastern decentralized its maintenance and repair facilities. (R. Vol. I, 246, 247). When this occurred Eastern adopted the practice of overhauling propellers at its principal repair base in Miami and then disassembling the propellers and shipping them to outlying repair bases for reassembly and installation on aircraft. From that time until after the time of the occurrences in this case in May, 1965, the portions of the maintenance manual maintained in Atlanta contained no instructions concerning the procedures to be followed by mechanics in reassembling a propeller following overhaul. (R. Vol. I, p. 166). The only procedures afforded to Atlanta mechanics were "hand-me-down" word of mouth instructions passed on from one mechanic to another. (R. Vol. I, 246-251) and an assembly check-sheet (Government Ex. 2, R. Vol. II, p. 2) which was prepared at the Atlanta repair base. (R. Vol. I, p. 151). The assembly check-sheet was not set forth in the maintenance manual (R. Vol. I, p. 168, 263), was not prescribed by the manufacturer and had not been approved by the Administrator. (R. Vol. I, p. 151-152).

Court's Exhibit A (R. Vol. II, p. 21, *et seq.*) contains all of the procedures contained in the portions of the maintenance manual maintained in Atlanta concernnig work on Electra propellers which are relevant to the present case. See stipulation, (R. Vol. I, pp. 373-375). All of the pages in Court's Exhibit A, except one (R. Vol. II, p. 49) were issued by General Motors Corporation, Allison Division, the propeller manufacturer, and relate to the servicing (line and heavy maintenance but not shop overhaul) of a propeller, giving instructions for removing a blade, adjusting a blade and reinserting a blade properly while the propeller is mounted on an aircraft or in a moderately equipped repair shop.[4]

The page which is the single exception was written by Eastern rather than the manufacturer and was inserted in the maintenance manual in November, 1965, six months after the events in this case, as a result of changes in procedures adopted by Eastern after this case arose. (R. Vol. II, p. 49; Vol. I, p. 182) That page does relate to propeller assembly procedures at outlying bases following overhaul and will be discussed in factual sequence, *infra.*

The four engined Lockheed Electra aircraft has four

[4] See introductory statement at page 28 of Court's Exhibit A (R. Vol. II, p. 28) where a "Propeller Overhaul Manual" is referred to. Reassembly of a propeller following overhaul is a part of the overhaul procedure which is not contained in Eastern's Atlanta maintenance manual. The basic procedures followed in repair maintenance and in overhaul maintenance are different. For example, in repair maintenance, mechanics are cautioned to work on and insert propeller blades at a positive angle of 18 degrees 15 minutes to 18 degrees 30 minutes (R. Vol. II, p. 44); whereas, in overhaul maintenance the propeller is reassembled with the blades at a negative angle of minus 4 degrees with the hub mechanism in full reverse position. (R. Vol. I, pp. 255-256; Vol. II, p. 2, Govt. Ex. 2)

propellers driven by jet turbine engines. Each of the propellers has four blades and is approximately 12 feet in diameter. The propeller is an exceedingly complex mechanism and incorporates a governor to control engine speed and power. (R. Vol. I, pp. 183, 250, 261) The propellers are overhauled at the Miami repair facility and shipped to outlying repair bases for reassembly in 4 boxes, one box containing the hub assembly, one the spinner and two boxes containing two blades each. (R. Vol. I, 250).

Propellers are assembled in Atlanta on metal stands on which a propeller shaft is mounted vertically. (R. Vol. I, pp. 186-7, 393) The propeller hub is placed on the shaft nose-end up and the blades are inserted horizontally. The hub has four recesses, one for each blade, inside of which is a female spline or peripheral gear. The base of each blade is circumscribed by a male spline. (R. Vol. I, pp. 183-186, 250-261) See illustration at R. Vol. II, p. 54. Each pair of meshing teeth on the hub and blade transcribe an arc of approximately 4 degrees so that an error of one tooth in insertion of a blade will result in a 4 degree error in pitch of the blade. (R. Vol. II, p. 48) Each blade must be installed in the hub in the horizontal plane at a pitch of minus 4 degrees relative to the vertical axis of the hub with the hub mechanism in full reverse position. (R. Vol. I, pp. 255-6; Vol. II, p. 2, Govt. Ex. 2)

The mechanics in Atlanta are furnished with a manual tool or instrument called a protractor which is used to measure the pitch of the blades at a designated measuring point called the 42 inch station. (R. Vol. II, pp. 66-68; Vol. I, 257) The protractor has two bubble levels, one of which is used to zero in the instrument in the perpendicular axis of the hub and the other of the levels is used to set the

scale of the instrument and to measure the pitch of the blade in the horizontal plane relative to the perpendicular or vertical axis of the hub.

The propeller shaft in the propeller stand, on which the propeller hub is mounted for assembly, is held to the stand by a flanged collar. In May, 1965, the collars on the stands were loose and defective, permitting movement of the shaft; and the concrete floor of the Eastern repair hangar in Atlanta contained irregularities. (R. Vol. I, pp. 187, 393-401) The propeller assembly sheet in use in May, 1965, contains only one line, or step, of installation instruction for all four blades. (Govt. Ex. 2, R. Vol. II, p. 2) It did not instruct the mechanics at the Atlanta repair base that the protractor should be rezeroed in the axis of the hub prior to the insertion of *each* of the four blades. (R. Vol. I, pp. 403-405).

On May 12, 1965, leadman Garrett[5] was instructed to assign men from his crew to assemble an Electra propeller and he was asked to take charge of emergency repairs to the landing gear of a Boeing 737 jet aircraft. He was also assigned the maintenance of batteries being reconditioned and charged in the battery shop. (R. Vol. I, 219-221) On the particular shift he had only three men, in addition to himself, in his crew, McDaniel, Walters and Petsch. (R. Vol. I, pp. 219,222).

The Boeing 737 aircraft was new in the Eastern system at the time and this was the first 737 required to be placed upon jacks at the Atlanta repair base. (R. Vol. I, pp. 221-226) While he himself studied the manual on the 737 aircraft to determine the manner in which the 737 should be placed on jacks in order to avoid damage to the aircraft,

[5] A leadman or crew chief is not a supervisory employee but is an hourly-paid, working group leader. (R. Vol. I, p. 142, 159-160)

Garrett assigned petitioners and Petsch to the assembly of the propeller and Walters was assigned also to attend the battery shop. Petsch, McDaniel and Walters worked on the propeller assembly for an hour or more while Garrett was studying the manual and having telephone conferences with the Miami repair base concerning the repair requirements on the 737 aircraft. (R.Vol. I, pp. 227-229) At the end of about an hour the Boeing 737 was brought to the hanger from the flight line and Garrett called Petsch and McDaniel away from the propeller assembly to assist in bringing the 737 into the hanger. (R. Vol. I, p. 229, 230). At this time Walters left the propeller assembly to check the battery shop. (R. Vol. I, p. 230) All three returned to the propeller assembly and worked for about half an hour and McDaniel and Petsch were again called away, this time to assist in jacking up the 737 aircraft (R. Vol. I, p. 231, 382) Thereafter Petsch did not return to the propeller assembly but remained to assist with the 737 repairs.[6] Sometime later McDaniel was again called from the propeller assembly to assist in removing the 737 from the jacks and at this time all four blades had been inserted in the propeller and locked up, and the mechanical assembly was complete. (R. Vol. I, p. 236, 388) Walters, an electrical specialist, completed the assembly of the propeller electrical connections and called inspector George Brownlee to check the propeller and approve it for service. (R. Vol. I, p. 236, 337) When Brownlee inspected the propeller, none of the procedural steps in the propeller assembly sheet had been signed-off by the mechanics and Walters signed on each line of the

[6] At this time two blades had been installed and locked up. (R. Vol. I, 383) The testimony of Garrett that Petsch assisted in the assembly of the propeller for at least one and one-half hours is uncontradicted. Petsch testified that he was "not sure". (R. Vol. I, 347)

step-by-step assembly procedure although he had not personally performed each step of the operations. (R. Vol. I, p. 338) It was not unusual for a mechanic to sign off work performed by others in his crew and in his presence. (R. Vol. I, p. 261, 262, 338-340) Walters and McDaniel testified that the propeller was assembled in accordance with the instructions which they had received and in accordance with the usual practice and procedure; (R. Vol. I, 334, 338, 339, 383) and there was no evidence to the contrary. While Inspector Brownlee should have checked the angle of each of the propeller blades with the protractor at the time of his inspection, he asked Walters if each had been measured with a protractor and receiving an affirmative reply, checked the blades only with a "devil's level", a less accurate instrument than the protractor. (R. Vol. I, 321, 322)

The propeller was installed on an Electra aircraft on the following day, and shortly thereafter the pilot of the aircraft, while in flight, discovered an unusual vibration.[7] The aircraft was returned to the base and the propeller was removed and it was discovered that one blade had been installed at -8° full reverse position, rather than at -4°, or one gear tooth off the proper point of insertion.[8] The blade was reinstalled properly and the propeller was reinstalled on the aircraft. (R. Vol. I, 308-311)

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[7] An unusual noise was noted at the time the propeller was installed on the aircraft, but it was diagnosed as being due to a cross-wind. (R. Vol. I, 362-365, 370)

[8] Any error in assembly of aircraft and components is to be avoided; but the District Court correctly found (R. Vol. I, 458), that this was not a serious condition. Similar vibration could be caused by grease leaking from the propeller hub causing a state of imbalance (R. Vol. I, 203, 260) or by the harmonic created by a cross-wind (R. Vol. I, 328).

A short time later other propeller blades were discovered at time of assembly to have been improperly inserted even though the prescribed procedures had been followed and on other occasions aircraft were discovered with one propeller blade inserted improperly. (R. Vol. I, 312, 350-355, 405). As a result, Richard A. McQuillen, who at the time was Chief Steward and safety officer for the Machinists Union, collective bargaining representative of the Eastern mechanics, made an investigation to ascertain why blades could be improperly installed when the prescribed procedure had been followed. He discovered that on occasion improper insertion of propeller blades could result even though the protractor indicated proper angles of insertion when the protractor had been zeroed in the vertical axis of the hub only once. He also discovered that improper insertion could be avoided by reorienting the protractor in the vertical axis of the hub in the plane of insertion of each blade before each blade was installed. (R. Vol. I, 402, 407, 414) A diagramatic illustration of McQuillen's testimony, showing that if a propeller hub when placed on the propeller stand should come to rest out of true vertical because of the loose condition of the collar or because of the uneven hangar floor, an error in the insertion of a blade can occur unless the protractor is reoriented before each blade is installed, is contained in Appendix D, *infra*, pages 30a and 31a.

McQuillen, as safety director, filed a complaint with F.A.A. concerning the defective condition of the propeller stands and an investigation was conducted in which the supervisory personnel of Eastern Airlines and F.A.A. participated; but Foreman E. A. White of Eastern would not permit McQuillen to participate in the investigation. Subsequently the propeller stands were repaired; (R. Vol. I,

398-402) and in November, 1965, Eastern began painting an index mark on the hub and on each blade at the proper angle of insertion at the time of overhaul in Miami and issued a new assembly sheet which contained a separate instruction for the insertion of each blade, requiring each blade to be separately measured and signed off. (R. Vol. I, 181, 182)[9]

Other than to assign competent mechanics to the assembly of the propeller, Garrett took no part in its assembly since his entire time on the work shift was consumed in the emergency repair of the 737 aircraft. To hold him responsible for the work of the mechanics the Government introduced a job description from Eastern's general maintenance manual describing the duties of a lead mechanic which stated that the lead mechanic is responsible for the work of the members of his crew.[10] The District Court held that he was jointly responsible with the members of his crew, notwithstanding that Garrett was prevented from taking any part in the propeller assembly or supervising the assembly by the emergency assignment given him by the airline to return the Boeing 737 jet aircraft to service as soon as possible.

W. F. Petsch participated in the assembly of the pro-

[9] Court's Exhibit A, page 49 (R. Vol. II, p. 49), which reflects the practice of marking hub and blade with a paint stripe at time of propeller overhaul in Miami, is dated November 22, 1965, six months after the events in this case occurred. This page is the only instruction in the portion of Eastern's maintenance manual maintained in Atlanta which relates to building-up a propeller at outlying bases following overhaul and it was not in the Atlanta manual in May, 1965. (R. Vol. I, 408-410)

[10] The Government's chief witness admitted that the job description was not a maintenance procedure. (R. Vol. I, 165)

peller for at least an hour and a half and in the insertion of at least one, and probably more, blades (R. Vol. I, 383). Notwithstanding this uncontradicted fact, the Government withdrew its case against him in its brief filed with the District Court (R. Vol I, 484); and the District Court approved the Government's asserton that it had not made out a case against Petsch. (R. Vol. I, 457) Counsel for petitioners has never been able to discover any reason for the Government's withdrawal of the case against Petsch, other than, as noted previously, that at the time of the trial he had been made a foreman and had become a supervisory employee of the air carrier.

REASONS FOR GRANTING THE WRIT

I.

A NOVEL QUESTION OF NATIONAL SCOPE CONCERNING THE ADMINISTRATION OF AN IMPORTANT FEDERAL STATUTE WHICH MATERIALLY AFFECTS SAFETY IN CIVIL AVIATION IS PRESENTED.

Approximately 96,000 mechanics in the airline industry, certificated by the Federal Aviation Administrator[11] are subject to the dual disciplinary procedures provided by Congress for the enforcement of the safety provisions of the Federal Aviation Act and the safety rules and regulations of the Administrator. The two procedures are certificate action under 49 U.S.C., Section 1429, and civil penalties under 49 U.S.C., Section 1471.[12] Little statistical information concerning the relative use of the two procedures has been available from the Federal Aviation Administration but it is certain that monetary discipline is used as frequently as is certificate action.[13] This is true notwithstand-

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[11] Statistics furnished by Federal Aviation Administration.

[12] *Wilson v. C.A.B.*, 244 F.2d 773, App.D.C., 1957, cert.den. 355 U.S. 870; *Hard v. C.A.B.*, 248 F.2d 761, 7th Cir., 1957, cert. den. 355 U.S. 960; *Pangburn v. C.A.B.*, 311 F.2d 349, 1st Cir., 1962.

[13] The General Counsel of the Federal Aviation Administration advises that the most recent figures available are for the fiscal year 1968 and that:

"During fiscal year 1968, 3,173 violations of the Federal Aviation Regulations were reported to the Office of the General Counsel; 3,127 actions were processed to completion. Of the latter figure, 1,518 were proceedings involving suspension or revocation of airman certificates. Of the completed cases not involving certificate sus-

ing the fact that reported judicial decisions in certificate action cases greatly outnumber the meager dozen civil fine decisions which are in the reports.[14]

This results from several factors. First, all enforcement actions are initiated in the same fashion and the determination of which procedure will be used is made after the first step in the administrative procedure has been completed.[15] Second, ordinarily a fine is imposed for violations which are regarded not to be so serious as to justify certificate action. Third, as a practical matter a civil penalty may be imposed under either procedure and not infrequently in certificate action proceedings the Administrator has withheld certificate action upon condition of the payment of a civil penalty.[16]

The fair and proper use of the civil penalty procedure

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pension or revocation, civil penalties in the form of fines accounted for 855 cases. Total civil penalties collected ammounted to $168,643.88. There were 460 cases closed without action. The remaining cases were disposed of by referral to appropriate military authorities for action, referral to foreign governments, and by administrative action consisting of letters of correction or letters of reprimand."

[14] A list and thumbnail summary of all reported civil fine decisions which we have found is included as Appendix E, *infra,* pages 32a-33a.

[15] The first step is the notice of an investigation to the airman concerned and his response. Defendants' Exhibit 2, R. Vol. I, pp. 343-356; Vol. II, pp. 3-16; Federal Aviation Regulations, Part 13; 14 C.F.R., Section 13.1, *et seq.*

[16] An informative and authoritative review of enforcement procedures is contained in *The Traffic Cop of the Skies—F.A.A. Enforcement Actions,* 35 Journal of Air Law & Commerce 40, 1969, published by School of Law, Southern Methodist University, Dallas, Texas.

in the district courts is of much importance to the statutory enforcement scheme and to safety in civil aviation, and the practical ability of the Administrator to impose a civil penalty in the certificate action procedure, and the fact that he is not compelled by law to use the district court procedure in all cases in which he feels that a civil penalty is the proper disciplinary action, is of much pertinence to the present case.

Section 901 of the Federal Aviation Act (49 U.S.C., Section 1471) authorizes the imposition of a civil penalty in the district courts only for a violation of the Act itself or of a "rule, regulation or order issued thereunder." No such limitation is contained in Section 609 (49 U.S.C., Section 1429), the certificate action procedure, and the Administrator may impose a civil penalty under that procedure for any cause which safety in air commerce requires, irrespective of whether the Act or a regulation has been violated. It can, therefore, be of no great concern to the Admniistrator in disciplining individuals[17] which procedure is used; but it is of tremendous importance to 96,000 certificated mechanics that, in a matter so technical as aircraft maintenance procedures, they not be deprived of the expertise of the National Transportation Safety Board when the statute entitles them to a trial *de novo* in that forum rather than in a United States district court.[18]

Section 601 (49 U.S.C., Section 1421) charges the Administrator with the duty and power to prescribe and revise "reasonable rules and regulations and minimum

[17] As distinguished from in rem actions against aircraft. Cf., 49 U.S.C., Section 1473.

[18] The District Court admitted in this case that the repair procedure was too technical for it to understand. R. Vol. I, p. 453.

standards governing in the interest of safety, the inspection, servicing and overhaul of aircraft, aircraft engines, propellers and appliances." The statute does not authorize air carriers to prescribe or revise rules and regulations and minimum standards and it does not authorize the Administrator to delegate that rule making authority to an air carrier. Neither does it authorize the Administrator to use the district court procedure to impose a civil penalty upon an airman for violation of an air carrier's repair procedure which has never been approved by him as a satisfactory minimum standard.

In *Shankland v. Washington,* 5 Pet. 390, 8 L.Ed. 166, this Court established the rule applicable in cases of delegated authority and has never deviated from it. It was there stated: "It is a general rule that in all cases of delegated authority where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another unless there is a special power of substitution, either express or necessarily implied." The President of the United States necessarily has implied authority to redelegate discretionary authority delegated to him by Congress. *Shreveport Engraving Co. v. United States,* 143 F.2d 222, 5th Cir., 1944, cert.den., 323 U.S. 749, reh'g den., 323 U.S. 815. But for an inferior administrative official to delegate discretionary authority requires express authorization. [*Cudahy Packing Co. v. Holland,* 315 U.S. 357 (1942)], except where the nature of the power necessarily requires delegation. *N.L.R.B. v. Duval Jewelry Co.,* 357 U.S. 1 (1958). The rule making authority has never been held subject to redelegation even by the Presi-

dent. Cf., *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *Schechter Poultry Co. v. United States,* 295 U.S. 495 (1935).

The delegation to an air carrier of authority to establish repair procedures having the dignity of a rule promulgated by the Administrator himself, not only deprives interested parties of the protection of the Administrative Procedures Act in the promulgation of the rule (cf., *Allen W. Hayes v. United States,* 264 F.2d 929, 2nd Cir., 1959), but it also authorizes the air carrier to suspend the rule without the approval of the Administrator through the action of a repair foreman instructing employees to deviate from the rule.[19]

The danger of such an occurrence is demonstrated in the present case; in fact, leadman Garrett was held responsible for the work of competent mechanics to whom he had assigned the propeller assembly because the rule of the carrier stated that a part of his job duties was to be responsible for their work. But he was prevented from carrying out that responsibility by being instructed to perform the more important emergency responsibility of returning a 737 jet aircraft to service which engaged his entire attention while the propeller was being assembled.

Congress provided for imposition of civil penalties by the district courts where the Act or a rule, regulation or order issued under the Act had been violated; but it gave the Administrator virtually unlimited scope in disciplining

[19] Foreman White of Eastern testified that the propeller build-up sheet (Govt. Ex. 2, R., Vol. II, p. 2) was prepared at the Atlanta repair facility under his direction (R. Vol. I, 151. Subsequently in November, 1965, a revised build-up sheet (Defendants' Ex. 4, R. Vol. II, p. 20) was prepared. (R. Vol. I, p. 181, 182)

airmen by certificate action. The courts were given authority only to apply the studied language adopted by Congress and by the Administrator, but the Administrator was given authority to punish even for violation of customs, practices and unwritten law. As a protection to certificate holders, however, Congress provided a *de novo* review before the National Transportation Safety Board of disciplinary actions taken by the Administrator. Certificated airmen should not be deprived of the right to have technical matters reviewed by the expert tribunal established by Congress for this purpose and especially is this so where such a construction of the statute does not impair its effective administration in any respect but, to the contrary, adheres to the obvious intent of Congress to entrust to the district courts only the construction of clear language adopted by Congress or by the Administrator himself after due deliberation and publication pursuant to the Administrative Procedures Act. The authority of the Administrator, as found by the District Court, is broad; but it is not so broad as to permit him to extend or vary the statute. Cf., *Kashland v. Helvering*, 298 U.S. 441; *Fed. Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, re'h. den. 347 U.S. 965; *Peters v. Hobby*, 349 U.S. 331.

II.

THE BROAD AND LIBERAL APPLICATION OF THE CIVIL PENALTY STATUTES IN THIS CASE CONFLICTS WITH OTHER DECISIONS HOLDING THAT PENALTIES SHOULD BE STRICTLY CONSTRUED AND APPLIED.

In *Pike v. Civil Aeronautics Board*, 303 F.2d. 353, 8th Cir., 1962, in deciding whether Section 901, the civil

penalty statute, should be applied, the Court said: "Such a penalty certainly is punitive," and held that, in deciding whether a civil penalty should be imposed, both the statute and the regulation alleged to have been violated should be construed "with an attitude of reasonable strictness". Likewise, in *United States v. Proper,* 7 AVI. 18, 173, U.S.D.C., N.Y., 1962, it was held that a pilot had the right to rely on the manual and regulations of the air carrier by whom he was employed where the civil air regulations were so ambiguous as to cast doubt in the pilot's mind as to a proper determination of a Federal Aviation Agency inspector's right to access to the flight deck of an aircraft in flight; and a complaint for a civil penalty against the pilot was dismissed. These decisions comport with the usual rule that penalty statutes are to be strictly construed and applied. No other decision prior to that of the 5th Circuit in the present case departs from this basic concept of statutory construction.

Perhaps this appears to be a conflict of decision of small import; however, the adoption of a liberal or broad, rather than a strict, construction of a penalty statute carries with it a vast difference in the burden of proof resting upon the Government, tantamount to a shifting in the burden of proof. This shifting of the burden is manifest in the present case. The Government introduced no evidence that petitioners failed to follow the repair procedures which had been prescribed by Eastern Airlines. It relied entirely upon a presumption that if prescribed repair procedure had been followed the error in the assembly of the propeller would not have occurred. Notwithstanding the positive and uncontradicted testimony that the usual procedures had been followed, the District Court adopted this presumption as sufficient to sustain a violation. He found: "Thus, proof

of the accepted method carries the burden of establishing the basis for violation" (R. Vol. I, 456), and "While such instructions are verbose, technical and beyond the practical comprehension of all except the most experienced mechanic, a literal adherence to them would have affected a proper assembly in this instance" (R. Vol. I, 453). The District Court made no affirmative finding of evidence that petitioners did not adhere to the prescribed repair procedures and indeed he could not, because there was none; and in reaching this finding he ignored completely the uncontradicted testimony of Petsch and McQuillen that an error in assembly could occur, and had occurred in other cases, even though the prescribed procedure was followed. The District Court held that "The regulatory powers under the Act are broad" (R. Vol. I, 456).

These findings and this broad and liberal application of the penalty statute were approved by the Circuit Court without opinion.

Thus, the proper approach to all government regulation is involved in the determination of whether the penalty statute shall be strictly construed or broadly construed. Never does a person subject to penalty need the protection of the law more than when he is dealing with the enforcement officials of the sovereign, and this is particularly true where the Government representative is both the giver of the law and the enforcer.

III.

PUBLIC SAFETY DEMANDS THAT BLAME BE PLACED WHERE BLAME IS DUE.

Each day we see segments of our nation's population in revolt against injustices in our system of government—in

schools, in employment, and in our judicial system itself. Bombs explode in public buildings, killing and maiming the innocent, as evidence of the intensity of emotions which a sense of injustice can engender. It is imperative to public safety in air transportation, that, in their dealings with the government, the persons responsible for the mundane aspects of air safety not be burdened with the oppression of injustice and a sense of persecution. That the knowledge of a job well done is its own reward is implicit in the testimony and attitude of petitioners and their witnesses; but that attitude of responsibility for public safety can better be cultivated by the further knowledge that the job well done will be appreciated and by knowledge that blame will be placed where blame is due, than by fear of unjust prosecution. Resentments inculcated by unjust criticism and futility of endeavor breed negligence as well as outright violence. It is, therefore, imperative that the Government be scrupulously fair in its regulation both on the administrative level and on the judicial level. The Administration must constantly guard against inequities which are prone to grow from fraternalism between its representatives and the supervisory representatives of airlines with whom they deal on a daily, first name basis.

The primary responsibility for safety in the maintenance of commercial civil aircraft is placed upon the air carrier. *United States v. Lockheed Aircraft Service International, Inc.*, 202 Fed.Supp. 665, E.D. N.Y., 1962; F.A.A. Regulations, Section 121.363; 14 C.F.R., Section 121.363. The maintenance departments of air carriers are subject to the constant pressure of the needs of the service and there is constant temptation to take short cuts in returning aircraft to service. This is recognized by F.A.A. Regulations in providing that each aircraft, after it is repaired, will be ap-

proved for return to service by a certificated inspector and that the inspector, as an employee of the air carrier, must be under different supervision from the repair and maintenance department. F.A.A. Regulations, Sections 121.365(b) and (c); 14 C.F.R. 121.365(b) and (c). Thus the Regulations seek to provide for the public safety by removing the pressure of the needs of the service from the inspectors who certify the aircraft for return to service.[19a]

In the present case the propeller assembly sheet (Government Exhibit 2) was prepared by the Atlanta repair facility of Eastern Airlines. It was not included in the maintenance manual of the air carrier and was never approved by the Administrator as an adequate build-up aid.[20] In fact, the procedure for assemblying propellers following overhaul is not described at all in the portion of the air carrier's maintenance manual which is maintained in Atlanta. The assembly procedure sketchily covered by the assembly sheet was handed down by word of mouth from mechanic to mechanic. The assembly sheet did not require the reorientation of the protractor in the plane of each blade before that blade was installed and the mechanics had not discovered at the time the present case arose that such reorientation is essential to avoid error in the insertion of blades. Subsequently the mechanics themselves, under the auspices of the safety program sponsored by their Union, the International Association of Machinists, made an investigation

[19a] See also the additional precautions to insulate inspectors from service pressures in Regulation 121.369(8).

[20] The propeller build-up sheet is not a maintenance procedure in and of itself. However, the maintenance manuals of air carriers do contain build-up sheets which are a *part* of the maintenance procedures described in the manuals (R. Vol. I, 167, 168).

to discover why errors occurred in the insertion of blades in Atlanta. McQuillen, the safety director who made the investigation, did not make a positive determination of the reasons why the errors occurred but he did discover that the errors could be avoided by a reorientation of the protractor. The evidence shows that the protractor is a manually held instrument, separate from and unattached to the stand on which the propeller being assembled is mounted. It shows that there are irregularities in the concrete floor of the hangar and that the collar on the propeller stand was loose so that it was possible for the hub of the propeller to come to rest out of plumb with a true vertical axis when it was placed on the stand. (R. Vol. I, 405-407). The evidence also shows that in some better equipped repair shops the protractor is incorporated as a physical part of the propeller stand itself so that the measurements made by this more elaborate device are relative to the stand rather than to the earth's gravitation. (R. Vol. I, 248, 249)

Even "the most experienced mechanics" should not have been expected to know that when the template and scale of an instrument which measures angles by gravitation is zeroed relative to a propeller hub which is inclined out of true vertical, the angular scale of the instrument will give an erroneous measurement in a plane at 180° on the hub from the plane in which the instrument was zeroed and that the angular error in degrees will be double the incline of the hub in the plane in which the instrument was oriented. The physical fact that such an error will result unless the instrument is reoriented before each measurement is made is demonstrated by the diagrams contained in Appendix D, *infra*, pp. 30a-31a. Perhaps a professional engineer might have anticipated that such an error would occur; but Foreman White, the F.A.A. Regional Represen-

tatives, the District Court and the Circuit Court apparently did not perceive it even when pointed out and explained to them. Hourly-paid mechanics should not be expected to anticipate error when none of the instructions given them by the Airline told them that reorientation is essential before each blade is measured if error is to be avoided.[21]

Subsequent to the event in question Eastern Airlines repaired the propeller stands. It also began painting index marks on the hub and on each propeller blade at the proper angle of insertion at the time propellers were overhauled at the Miami repair base and it adopted a four-step assembly sheet which requires each blade to be separately measured with the protractor. Notwithstanding all of these facts the Courts below failed to perceive that the unapproved assembly procedure in effect when this case arose was inadequate to insure against error.

Foreman White of Eastern Airlines, the employee of Eastern who is responsible for proper repairs at the Atlanta hangar and who was responsible for the promulgation of the assembly sheets, was the chief witness for the Government. It does not appear that either Eastern Airlines or Foreman White were disciplined because of the events in

[21] The only instructions on the use of the protractor contained in the maintenance manual in Atlanta are in Court's Exhibit A, pages 65-67, (R. Vol. II, p. 65-67). At page 67, mechanics are instructed that each blade on a propeller mounted on an aircraft must be checked with the blade in the 9 o'clock position. This instruction insures that the blade to be checked is always in the same plane as that in which the instrument is oriented and accomplishes the same function as reorienting the instrument before each measurement. But such is not the equivalent of an instruction that, when a propeller is being assembled in the shop mounted horizontally on a stand and incapable of being rotated, the instrument must be reoriented in the plane of each blade before that blade is measured.

question but it does appear that precautions ultimately were taken by them to avoid the repetition of the event. When these circumstances are viewed in the light of the uncontradicted testimony of McQuillen as to the inadequacy of the instructions which had been given to the mechanics upon the use of the protractor, it is shown that the blame in this case was not placed where it was due. This inference of fraternalism between representatives of F.A.A. and of the air carrier so as to avoid placing responsibility where it is due contributes greatly to the assumption by this case of its status of importance to petitioners and their fellow mechanics.

This inference is accentuated by the prosecution of lead mechanic Garrett whose only act in connection with the assembly of the propeller was to assign mechanics of unquestioned competence to perform the work and who was prevented by his assignment to other more important emergency duties from personally supervising the propeller assembly. Garrett was involved only because his job description provides that he is responsible for the work of his crew. By the same token, Foreman White is likewise responsible, as is the air carrier. The prosecution of Garrett is in sharp contrast to the abandonment by the Government of the case against Petsch. Petsch participated in the actual assembly of the propeller as fully as did McDaniel but the evidence shows that at the time of the trial he had been made a foreman. There is absolutely no justification in the evidence for a difference in the case against Petsch and that against McDaniel. Walters, the electrician, performed more work on the propeller than any other employee but he was not as directly involved in the mechanical insertion of propeller blades as were Petsch and McDaniel.

To say that the injustice in the conduct of the Govern-

ment and in the judicial result in this case has perplexed and astounded counsel for petitioners is a gross understatement. It is no doubt always an error to feel that a case can have only one outcome but we are unable to understand how the District Court and the Circuit Court were unable to perceive the error and the injustice in the result which they espoused.

If mechanics responsible for safety in air commerce do not receive scrupulously fair and equal treatment both by the Administration and by the courts and if they are to feel that responsibility for errors of the air carrier can be passed to their shoulders, notwithstanding their conscientious interest in and efforts toward air safety, it cannot be expected that their devotion to duty shall not suffer.

CONCLUSION

For each of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PLATO E. PAPPS

LOUIS P. POULTON

J. R. GOLDTHWAITE, JR.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27436

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

A. T. GARRETT, W. D. WALTERS, AND J. B. MCDANIEL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

(December 2, 1969)

Before TUTTLE, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: On January 10, 1969, the District Court for the Northern District of Georgia imposed upon the appellants a civil penalty of one hundred dollars each. The unpublished opinion of the trial court will be annexed hereto as an appendix.

Upon consideration of the record, briefs, and argument of counsel we are of the opinion that the judgment of the District Court should be affirmed.

AFFIRMED.

APPENDIX

[Opinion of the District Court]

"These are four seldom-used proceedings, seeking to recover civil penalties against the defendants under 49 U.S.C.A. §1471(a). Specifically, they are accused of violation of 49 U.S.C.A. §1430(a)(2) which provides that it shall be unlawful

> For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this subchapter;

"The particular regulations involved are contained in Federal Aviation Regulations 14 CRF 43.13. These regulations, made a part of the statute, prescribe that 'each person maintaining or altering or performing preventive maintenance shall use methods, techniques and practices acceptable to the Administrator.' (14 CRF 43.13(a)). Specifically, the following is provided:

> Special provisions for air carriers and commermercial operators. Unless otherwise notified by the Administrator, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the air carrier manual of a certfiicated air carrier or commercial operator (that is required by its operating certificate

or approved operating specifications to provide a continuous airworthiness maintenance and inspection program) constitute acceptable means of compliance with this section.

14 CRF 43.13(c).

"The case was presented to the court, on which are made the following

FINDINGS OF FACT

"Each of the defendants was employed on May 13, 1965, at Eastern Air Lines' repair and overhaul assembly facility in Atlanta, under the general supervision of Mr. S. T. White, Manager-Aircraft Maintenance.

"Defendant Garrett occupied the position of Lead Mechanic (or foreman) over an eleven man crew, in which Petsch, Walters, and McDaniel were line mechanics. It is customery for several repair and maintenance jobs to be carried on simultaneously by groups of mechanics under the lead mechanic's direction. Certain regular work is carried on in routine fashion by each crew.

"The particular job in question involved the 'build-up' of an Electra prop. The major overhaul on such equipment is performed in Miami and the component parts shipped to Atlanta for assembly. The details of Electra prop assembly are buried in the manufacturer's (Allison) instructions inserted in the general Eastern maintenance manual. While such instructions are verbose, technical, and beyond the practical comprehension of all except the most experienced mechanics, a literal adherence to them would have effected a proper assembly in this instance.

"In actual practice, the company, Eastern, has developed a work sheet, which lays out by steps the essential of the contents of the maintenance manual though not a formal part thereof. Adherence to such work sheet would likewise have effected a proper assembly in this instance.

"While there was no specific approval by the FAA of the pertinent sections of the maintenance manual or the work sheet, such procedures had been in use for a considerable period of time both by the crews and certificated inspectors. Some 15 props per month were assembled in Atlanta on this basis.

"In the assembly itself, the parts are received in four boxes, two containing the four prop blades, one containing the hub and one the cover. The hub weighs approximately 500 pounds and is mounted by the crew on an assembly stand for working purposes. The key operation is to place the four blades in the proper receptacle at the correct pitch of -4° at 42" stations.

"In this particular instance, number 1 blade was inserted at -8° while blades 2, 3, and 4 were inserted correctly. The assembly passed various inspections and was placed into service, resulting in excessive vibration which lead to the discovery of the error. The responsibility of the inspectors involved is no longer at issue, but only that of the repair crew itself.

"In this instance, Garrett assigned the other defendants to the assembly. Petsch was the more experienced mechanic and was certificated by FAA. McDaniel was the lesser experienced and Walters occupied the dual capacity of mechanic-electrician. All

these participated in the initial set-up. Immediately after the first insertion of the blades, a field emergency with a 727 landing gear failure occurred. As this was a higher priority task, McDaniel and Petsch were called off the prop assembly by Garrett for such work, leaving Walters alone with the prop. Later Petsch and McDaniel returned, but before any additional work began, Petsch was called back to the 727 and had nothing further to do with the assembly.

"The initial part of the assembly is to check the pitch. Initially this is done with a 'devil's level', but the ultimate test is by use of a protractor. If the prop has been inserted into the wrong spline initially, it is necessary to reinsert the blade, always checking out the pitch by means of the protractor. It takes two men to handle each blade and normally the protractor work is checked by two men.

"Under such circumstances, Walters and McDaniel actually performed the work involved by improper seating and/or improper protractor readings. Walters actually initialed the work-sheet and summoned the inspector to approve the work. Neither the assembly stand nor the interruption by work on the field emergency caused or justified the improper assembly, which occured in violation of the worksheet and the maintenance manual. Indeed such conditions are commonplace and render the use of check-sheets even more viable.

CONCLUSIONS OF LAW

"While the statute involved concerns a penalty, it is civil in nature and when it is enacted and the implementing regulations adopted to promote the public good, a reasonable preponderance of the evidence is

sufficient to sustain the government's burden of proof. *United States v. Proper*, 7 Aviation 18.173 (D.C.N.Y. 1962).

"The central issue here, however, is not the quantum of proof, but the argument that the 'check sheet' in question was not tantamount to an FAA approved procedure or, if it is, that it represents an improper delegation of power by the FAA to the carrier. Private mechanics and contract repair bases must have all procedures approved directly by the FAA, while in the case of certificated air carriers as here, the carrier's own 'methods, techniques, and practices contained in the maintenance manual.' — 'constitute acceptable means of compliance with this section.' While the evidence does not reveal an affirmative approval of any such procedure, the regulation is negative in approach in that such procedures are proper 'unless otherwise notified by the Administrator.' Thus, proof of the accepted method carries the burden of establishing the basis for violation. Nor does the absence of the work sheet from the maintenance manual proper, in the court's opinion, destroy its efficacy. As far as the court can tell, the work sheet is merely a practical aid to the mass of detail in the manual proper. To rule that use of a common-sense tool such as this shifts the blame from mechanic to carrier is indeed strained. This court would be far more inclined to condemn a practice which placed the onus of the entire manual on the individual mechanic without such aids.

"Based on years of experience with the methods of certificated carriers, the regulation is reasonable and practical in substituting the carrier's procedures for the minutiae of individual FAA approval. The regu-

latory powers under the Act are broad. See *Doe v. C.A.B.*, 356 F.2d 699 (10th Cir. 1966); *Somlo v. C.A.B.*, 367 F.2d 791 (7th Cir. 1966). It cannot be said that such regulation is unreasonable or arbitrary.

"Based on the above, the evidence reveals a violation by defendants Walters and McDaniel. In this respect, the court is satisfied that they are directly involved. As to Petsch, even the government concedes that he was not involved either directly or indirectly and no showing as to any violation by him has been made. There remains the question of Garrett's culpability, if any. As the lead mechanic, or foreman, he was not directly involved and only exercised general supervisory power over the crew members. Thus the error occurred without his direct participation. No case is found delineating the limits of such responsibility. Under such circumstances the court can only hazard a trend, which in this instance points towards responsibility on Garrett's part also. Generally, the courts have adhered to a rule of non-delegability in such matters. Thus, an employer cannot disclaim responsibility on the grounds that its employees alone erred. *United States v. Lockheed Aircraft Service Int'l.*, 202 F. Supp. 665 (E.D. N.Y. 1962). Nor can an inspector delegate any duties under the statute. *French v. C.A.B.*, 378 F.2d 468 (10th Cir. 1967). Rationally, there is no distinction between these functions and that of the foreman. 'The neglect and oversights of his helpers provide no excuse for the petitioner.' What would be the point in requiring that a foreman be certificated if he does not share responsibility for his crew's performance. Otherwise, a simple assignment clerk is all that would be required or the crew could insist that the inspection failure was the

true fault. On reason, then, the court concludes that the supervising foreman bears equal responsibility with his crew for any violation of the act or regulations thereunder.

"Fortunately, the violation here was not serious. Accordingly, as to defendants Garrett, Walters, and McDaniel a civil penalty of $100.00 each is imposed. As to defendant Petsch, the case is dismissed. Appropriate judgments may be presented by government counsel."

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27436

D. C. Docket No. CA 10383, 10385
and 10386 (Consolidated)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

A. T. GARRETT, W. D. WALTERS AND J. B. MCDANIEL,

Defendants Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, COLEMAN and SIMPSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

December 2, 1969

Issued as Mandate: Jan. 27, 1970

(U. S. Court of Appeals filed Jan. 19, 1970, Edward W. Wadsworth, Clerk)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27436

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

A. T. GARRETT, W. D. WALTERS AND J. B. McDANIEL,

Defendants Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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Before TUTTLE, COLEMAN and SIMPSON,
Circuit Judges

January 19, 1970)

ON PETITION FOR REHEARING

Before TUTTLE, COLEMAN, and SIMPSON,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX B

STATUTES INVOLVED

Federal Aviation Act of 1958, Title VI, Section 601, 72 Stat. 775, 49 U.S.C., Section 1421:

1421. General safety powers and duties.—(a) Minimum standards—Rules and regulations. The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing and overhaul of aircraft, aircraft engines, propellers, nad appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

(b) Needs of service to be considered—Classification of standards.—In prescribing standards, rules, and regulations, and in issuing certificates under this title [§§ 1421-1431 of this title], the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this Act in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this title [§§ 1421-1430 of this title].

(c) Exemptions.—The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this title [§§ 1421-

1431 of this title] if he finds that such action would be in the public interest. (Aug. 23, 1958, P. L. 85-726, Title VI, § 601, 72 Stat. 775.)

Federal Aviation Act of 1958, Title VI, Section 609, 72 Stat. 779, 49 U.S.C., Section 1429:

1429. Amendment, suspension, and revocation of certificates.—The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certicfiates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of

its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006 [§ 1486 of this title], and the Administrator shall be made a party to such proceedings. (Aug. 23, 1958, P. L. 85-726, Title VI, § 609, 72 Stat. 779.)

Federal Aviation Act of 1958, Title VI, Section 610, 72 Stat. 780, 49 U.S.C., Section 1430:

1430. Prohibitions.—(a) Violaitons of title.—It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violaton of any order, rule, or regulaton issued under this title [§§ 1421-1431 of this title];

(3) For any person to employ for service in connection with any civil aircraft used in air commerce an airman

who does not have an airman certificate authorizing him to serve in the capacity for which he is employed;

(4) For any person to operate as an air carrier without an air carrier operating certificate, or in violation of the terms of any such certificate;

(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this title [§§ 1421-1431 of this title]; and

(6) For any person to operate a seaplane or other aircraft of United States registry upon the high seas in contravention of the regulations proclaimed by the President pursuant to section 1 of the Act entitled "An Act to authorize the President to proclaim regulations for preventing collisions at sea," approved October 11, 1951 (Public Law 172, Eighty-second Congress; 65 Stat. 406) [33 § 143]; and

(7) For any person holding an air agency or production certificate, to violate any term, condition, or limitation thereof, or to violate any order, rule, or regulation under this title [§§ 1421-1431 of this title] relating to the holder of such certificate.

(b) Exemption of foreign aircraft and airmen.—Foreign aircraft and airmen serving in connection therewith may, except with respect to the observance by such airmen of the air traffic rules, be exempted from the provisions of subsection (a) of this section, to the extent, and upon such terms and conditions, as may be prescribed by the Administrator as being in the interest of the public. (Aug. 23, 1958, P. L. 85-726, Title VI, § 610, 72 Stat. 780.)

Federal Aviation Act of 1958, Title IX, Section 901, 72 Stat. 783, 76 Stat. 149, U.S.C., Section 1471:

1471. Civil penalties. — (a) Safety, economic, and postal offenses.—(1) Any person who violates (A) any provision of title III [§§ 1341-1355 of this title], IV [§§ 1371-1387 of this title], V[§§ 1401-1405 of this title], VI [§§ 1421-1430 of this title], VII [§§ 1441-1443 of this title], or XII [§§ 1521-1523 of this title] of this Act, or any rule, regulation, or order issued thereunder, or under section 1002(i) [§ 1482(i) of this title], or any term, condition, or limitation of any permit or certificate issued under title IV [§§ 1471-1387 of this title], or (B) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. If such violation is a continuing one, each day of such violation shall constitute a separate offense: Provided, That this subsection shall not apply to members of the Armed Forces of the United States, or those civilian employees of the Department of Defense who are subject to the provisions of the Uniform Code of Military Justice, while engaged in the performance of their official duties; and the appropriate military authorities shall be responsible for taking any necessary disciplinary action with respect thereto and for making to the Administrator or Board, as appropriate, a timely report of any such action taken.

(2) Any such civil penalty may be compromised by the Administrator in the case of violations of titles III [§§ 1341-1355 of this title], V [§§ 1401-1405 of this title], VI [§§ 1421-1430 of this title], or XII [§§ 1521-1523 of this title], or any rule, regulation, or order issued thereunder, or by the Board in the case of violations of titles IV [§§ 1371-1387 of this title] or VII [§§ 1441-

1443 of this title], or any rule, regulation, or order issued thereunder, or under section 1002(i) [§ 1482(i) of this title], or any term, condition or limitation of any permit or certificate issued under title IV [§§ 1371-1387 of this title], or by the Postmaster General in the case of regulations issued by him. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(b) Liens.—In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty: Provided, That this subsection shall not apply to a violation of a rule or regulation of the Postmaster General. (Aug. 23, 1958, P. L. 85-726, Title IX, § 901, 72 Stat. 783; July 10, 1962, P. L. 87-528, § 12, 76 Stat. 149.)

Federal Aviation Act of 1958, Title IX, Section 903, 72 Stat. 786, 75 Stat. 467, 49 U.S.C., Section 1473:

1473. Venue and prosecution of offenses.—(a) Venue, —The trial of any offense under this Act shall be in the district in which such offense is committed; or if the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. If such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. Whenever the offense is begun in one jurisdiction and completed in another, or committed in more than one jurisdic-

tion, it may be dealt with, inquired of, tried, determined, and punished in any jurisdiction in which such offense was begun, continued, or completed, in the same manner as if the offense had been actually and wholly committed therein.

(b) Procedure in respect of civil penalties.—(1) Any civil penalty imposed under this Act may be collected by proceedings in personam against the person subject to the penalty and, in case the penalty is a lien, by proceedings in rem against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. The fact that in a libel in rem the seizure is made at a place not upon the high seas or navigable waters of the United States shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits in rem in admiralty.

(2) Any aircraft subject to such lien may be summarily seized by and placed in the custody of such persons as the Board or Administrator may by regulation prescribe, and a report of the cause shall thereupon by transmitted to the United States attorney for the judicial district in which the seizure is made. The United States attorney shall promptly institute proceedings for the enforcement of the lien or notify the Board or Administrator of his failure to so act.

(3) The aircraft shall be released from such custody upon payment of the penalty or the amount agreed upon in compromise; or seizure in pursuance of process of any court in proceedings in rem for enforcement of the lien, or notification by the United States attorney of failure to in-

stitute such proceedings; or deposit of a bond in such amount and with such sureties as the Board or Administrator may prescribe, conditioned upon the payment of the penalty or the amount agreed upon in compromise.

(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law. (Aug. 23, 1958, P. L. 85-726, Title IX, § 903, 72 Stat. 786; Sept. 5, 1961, P. L. 87-197, § 2, 75 Stat. 467.)

APPENDIX C

PERTINENT SECTIONS FROM FEDERAL AVIATION REGULATIONS

14 Federal Code of Regulations, Sections:

§ 43.13 Performance rules (general).

(a) Each person maintaining or altering, or performing preventive maintenance, shall use methods, techniques, and practices acceptable to the Administrator. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

(c) *Special provisions for air carriers and commercial operators.* Unless otherwise notified by the Administrator, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the air carrier manual of a certificated air carrier or commercial operator (that is required by its operating certificate or approved operating specifications to provide a continuous airworthiness maintenance and inspection program) constitute acceptable means of compliance with this section.

Subpart G—Manual Requirements

§ 121.131. Applicability.

This subpart prescribes requirements for preparing and maintaining manuals by all certificate holders.

§ 121.133. Preparation.

(a) Each domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations.

(b) Each supplemental air carrier and commercial operator shall prepare and keep current a manual for the use and guidance of flight, ground operations, and management personnel in conducting its operations.

§ 121.135 Contents.

(a) Each manual required by § 121.133 must—

(1) Include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety;

(2) Be in a form that is easy to revise;

(3) Have the date of last revision on each page concerned; and

(4) Not be contrary to any applicable Federal regulation and, in the case of a flag or supplemental air carrier, any applicable foreign regulation, or the certificate holder's operations specifications or operating certificate.

(b) The manual may be in two or more separate parts, containing together all of the following information, but each part must contain that part of the information that is appropriate for each group of personnel:

(1) General policies.

(2) Duties and responsibilities of each crewmember and appropriate members of the ground organization and in the case of supplemental air carriers and commercial operators, management personnel.

(3) Reference to appropriate Federal Aviation Regulations.

(4) Flight dispatching and operational control, including procedures for coordinated dispatch or flight control or flight following procedures, as applicable.

(5) En route flight, navigation, and communication procedures, including procedures for the dispatch or release or continuance of flight if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route.

(6) For domestic or flag air carriers, appropriate information from the en route operations specifications, including for each approved route the types of aircraft authorized, their crew complement, the type of operation such as VFR, IFR, day, night, etc., and any other pertinent information.

(7) For supplemental air carrier or commercial operators, appropriate information from the operations specifications, including the area of operations authorized, the types of aircraft authorized, their crew complement, the type of operation such as VFR, IFR, day, night, etc., and any other pertinent information.

(8) Appropriate information from the airport operations specifications, including for each airport—

(i) Its location (domestic and flag air carrier operations only);

(ii) Its designation (regular, alternate, provisional, etc.) (domestic and flag air carrier operations only);

(iii) The types of aircraft authorized (domestic and flag air carrier operations only);

(iv) Instrument approach procedures;

(v) Landing and takeoff minimums; and

(vi) Any other pertinent information.

(9) Takeoff, en route, and landing weight limitations.

(10) Procedures for familiarizing passengers with the use of emergency equipment, during flight.

(11) Emergency equipment/and procedures.

(12) The method of designating succession of command of flight crewmembers.

(13) Procedures for determining the usability of landing and takeoff areas, and for disseminating pertinent information thereon to operations personnel.

(14) Procedures for operating in periods of ice, hail, thunderstorms, turbulence, or any potentially hazardous meteorological condition.

(15) Airman training programs, including appropriate ground, flight, and emergency phases.

(16) Instructions and procedures for maintenance, preventive maintenance, and servicing.

(17) Time limitations, or standards for determining time limitations, for overhauls, inspections, and checks of airframes, engines, propellers, and appliances.

(18) Procedures for refueling aircraft, eliminating fuel contamination, protection from fire (including electrostatic

protection), and supervising and protecting passengers during refueling.

(19) Airworthiness inspections, including instructions covering procedures, standards, responsibilities, and authority of inspection personnel.

(20) Methods and procedures for maintaining the aircraft weight and center of gravity within approved limits.

(21) Where applicable, pilot and dispatcher route and airport qualification procedures.

(22) Accident notification procedures.

(23) Other information or instructions relating to safety.

(c) Each certificate holder shall maintain at least one complete copy of the manual at its principal operations base.

§ 121.137 Distribution.

(a) Each certificate holder shall furnish copies of the manual required by § 121.133 (and the changes and additions thereto) or appropriate parts of the manual to—

(1) Its appropriate ground operations and maintenance personnel;

(2) Crewmembers; and

(3) Representatives of the Administrator assigned to it.

(b) Each person to whom a manual or appropriate parts of it are furnished under paragraph (a) of this section shall keep it up to date with the changes and additions furnished to him.

Subpart L—Maintenance, Preventative Maintenance, and Alterations

§ 121.361 Applicability.

This subpart prescribes requirements for maintenance, preventative maintenance, and alterations for all certificate holders.

§ 121.363 Responsibility for airworthiness.

(a) Each certificate holder is primarily responsible for—

(1) The airworthiness of its aircraft, including airframes, aircraft enginers, propellers, appliances, and parts thereof; and

(2) The performance of the maintenance, preventive maintenance, and alteration of its aircraft, including airframes, aircraft engines, propellers, or appliances, and parts thereof, in accordance with its manual and the regulations of this chapter.

(b) A certificate holder may make arrangements with another person for the performance of any maintenance, preventive maintenance, or alterations. However, this does not relieve the certificate holder of the responsibility specified in paragraph (a) of this section.

§ 121.365 Maintenance, preventive maintenance, and alteration organization.

(a) Each certificate holder that performs any of its maintenance (other than required inspections), preventive maintenance, or alterations, and each person with whom it arranges for the performance of that work must have an organization adequate to perform the work.

(b) Each certificate holder that performs any inspec-

tions required by its manual in accordance with § 121.369(b) (2) or (3) (in this subpart referred to as "required inspections") and each person with whom it arranges for the performance of that work must have an organization adequate to perform that work.

(c) Each person performing required inspections in addition to other maintenance, preventive maintenance, or alterations, shall organize the performance of those functions so as to separate the required inspection functions from the other maintenance, preventive maintenance, and alteration functions. The separation shall be below the level of administrative control at which overall responsibility for the required inspection functions and other maintenance, preventive maintenance, and alterations functions are exercised.

§ 121.367 Maintenance, preventive maintenance, and alterations program.

Each certificate holder shall have an inspection program and a program covering other maintenance, preventive maintenance, and alterations that ensures that—

(a) Maintenance, preventive maintenance, and alterations performed by it, or by other persons, are performed in accordance with the certificate holder's manual;

(b) Competent personnel and adequate facilities and equipment are provided for the proper performance of maintenance, preventative maintenance, and alterations; and

(c) Each aircraft released to service is airworthy and has been properly maintained for operation in air transportation.

§ 121.369 Manual requirements.

(a) The certificate holder shall put in its manual a chart or description of the certificate holder's organization required by § 121.365 and a list of persons with whom it has arranged for the performance of any of its required inspections, other maintenance, preventive maintenance, or alterations, including a general description of that work.

(b) The certificate holder's manual must contain the programs required by § 121.367 that must be followed in performing maintenance, preventive maintenance, and alterations of that certificate holder's airplanes, including airframes, aircraft engines, propellers, appliances, and parts thereof, and must include at least the following:

(1) The method of performing routine and nonroutine maintenance (other than required inspections), preventive maintenance, and alterations.

(2) A designation of the items of maintenance and alteration that must be inspected (required inspections), including at least those that could result in a failure, malfunction, or defect endangering the safe operation of the aircraft, if not performed properly or if improper parts or materials are used.

(3) The method of performing required inspections and a designation by occupational title of personnel authorized to perform each required inspection.

(4) Procedures for the reinspection of work performed pursuant to previous required inspection findings ("buy-back procedures").

(5) Procedures, standards, and limits necessary for required inspections and acceptance or rejection of the items required to be inspected and for periodic inspection and calibration of precision tools, measuring devices, and test equipment.

(6) Procedures to ensure that all required inspections are performed.

(7) Instructions to prevent any person who performs any item of work from performing any required inspection of that work.

(8) Instructions and procedures to prevent any decision of an inspector, regarding any required inspection from being countermanded by persons other than supervisory personnel of the inspection unit, or a person at that level of administrative control that has overall responsibility for the management of both the required inspection functions and the other maintenance, preventive maintenance, and alterations functions.

(9) Procedures to ensure that required inspections, other maintenance, preventive maintenance, and alterations that are not completed as a result of shift changes or similar work interruptions are properly completed before the aircraft is released to service.

§ 121.371 Required inspection personnel.

(a) No person may use any person to perform required inspections unless the person performing the inspection is appropriately certified, properly trained, qualified, and authorized to do so.

(b) No person may allow any person to perform a required inspection unless, at that time, the person performing that inspection is under the supervision and control of an inspection unit.

(c) No person may perform a required inspection if he performed the item of work required to be inspected.

(d) Each certificate holder shall maintain, or shall determine that each person with whom it arranges to per-

form its required inspections maintains, a current listing of persons who have been trained, qualified, and authorized to conduct required inspections. The persons must be identified by name, occupational title, and the inspections that they are authorized to perform. The certificate holder (or person with whom it arranges to perform its required inspections) shall give written information to each person so authorized describing the extent of his responsibilities, authorities, and inspectional limitations.

The list shall be made available for inspection by the Administrator upon request.

APPENDIX D—PLATE I-A*

A. Vertical axis of hub inclined 2° left — view facing point of tractor orientation.

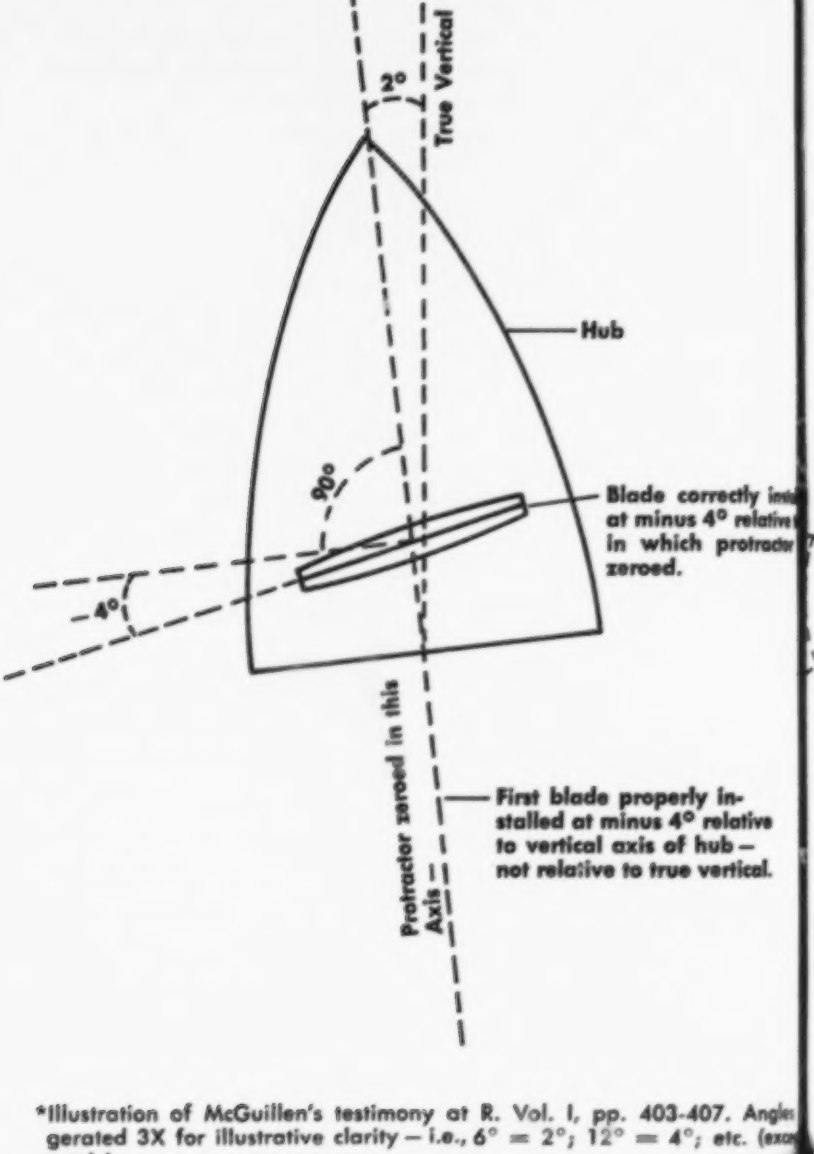
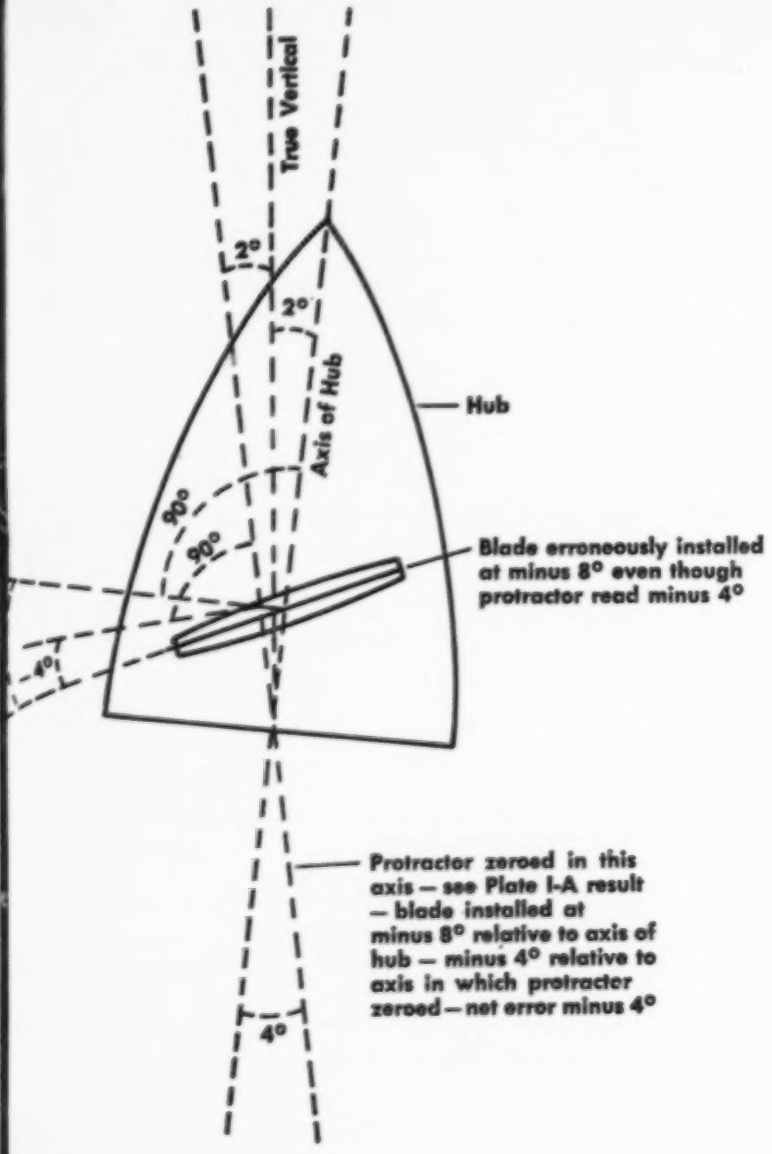


*Illustration of McGuillen's testimony at R. Vol. I, pp. 403-407. Angles gerated 3X for illustrative clarity — i.e., 6° = 2°; 12° = 4°; etc. (exc angle).

APPENDIX D—PLATE I-B*

tical axis of hub inclined 2° right — view opposite (at 180°) m Plate I-A view protractor not rezeroed following Plate I-A tallation.


True Vertical
2°
2°
Axis of Hub
Hub
90°
90°
Blade erroneously installed at minus 8° even though protractor read minus 4°
4°
Protractor zeroed in this axis — see Plate I-A result — blade installed at minus 8° relative to axis of hub — minus 4° relative to axis in which protractor zeroed — net error minus 4°
4°

aggerated 3X as in Plate I-A.

APPENDIX E

List and Thumbnail Summary of Reported Decisions in Civil Penalty Cases

B & M Leasing Corp. v. United States, 331 F.2d 592, 5th Cir., 1964:

> Civil penalty for violation of F.A.A. rule requiring a commercial operator's certificate and a second pilot for aircraft carrying passengers where evidence revealed lease arrangement was sham.

Allen W. Hayes v. United States, 264 F.2d 929, 2nd Cir., 1959:

> Where United States brought civil penalty libel for violation of airworthiness directive requiring a landing gear lock, the directive could not be challenged in the district court procedure—administrative procedure provided for challenges to technical directives must first be exhausted.

Rawdon v. United States, 364 F.2d 803, 9th Cir., 1966, cert. den. 386 U.S. 909, re'h. den. 386 U.S. 1043:

> Civil penalty for inspecting aircraft while inspector's certificate was suspended.

Rosenhan v. United States, 131 F.2d 932, 10th Cir., 1942, cert.den. 318 U.S. 790:

> Civil penalty for operating aircraft without certificate of airworthiness required by statute.

United States v. Aero Spacelines, Inc., 361 F.2d 916, 9th Cir., 1966:

> Aircraft leased exclusively to NAASA is a "public" aircraft and operator is not required to have commercial license required of civil aircraft operators.

United States v. Clayton, 198 F.Supp. 18, W.D. La., 1961:

Civil penalty for violation of C.A.B. air traffic rule under 1938 statute.

United States v. Duncan, 280 F.Supp. 975, N.D. Tex., 1968:

Violation of rule of F.A.A. requiring oxygen mask for pilot at or over 25,000 ft. when only one pilot at controls.

United States v. Drumm, 50 F.Supp. 451, 55 F.Supp. 151, D.C. Nev., 1944:

Civil penalty for flying without pilot's certificate.

United States v. Krebs, 104 F.Supp. 670, D.C. Nebr., 1952:

Venue question in civil penalty case.

United States v. Lockheed Aircraft Service International, Inc., 202 F.Supp. 665, E.D. N.Y., 1962:

Repair station is responsible for negligent repair by its mechanics and inspectors even though they are certificated.

United States v. Northwest Airlines, Inc., 69 F.Supp. 482, D.C. Minn., 3rd Div., 1946:

Airline responsible for refusal of pilot to permit F.A.A. inspector access to flight deck for inspection.

United States v. Proper, 7 Avi. 18,173, U.S.D.C., N.Y., 1962:

Pilot not responsible for civil penalty where F.A.A. regulations were ambiguous as to right of inspector's access to flight deck of aircraft and he relied on airline rules.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1427

A. T. GARRETT, W. D. WALTERS AND
J. B. MCDANIEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were mechanics employed by Eastern Airlines at its repair and overhaul assembly facility in Atlanta, Georgia. The United States brought actions against them under 49 U.S.C. 1471(a), seeking civil penalties for their alleged violations of their statutory and regulatory [1] obligation to follow the in-

[1] The relevant statutory and regulatory provisions upon which petitioners' liability was based are set forth in the Appendix to the Petition at pp. 14a, 16a, 20a.

structions set out in an Eastern Airlines maintenance manual in repairing an airplane propeller. After a hearing, the United States District Court for the Northern District of Georgia issued a comprehensive opinion finding that petitioners had committed the alleged violation; because the violations were of limited scope and caused no harm, it imposed a civil penalty of only $100 on each.[2] The court of appeals affirmed *per curiam*, relying upon the opinion of the district court which it annexed as an appendix (Pet. App. A 1a, 2a-8a). The court of appeals denied a petition for a rehearing on January 19, 1970 (Pet. App. A 10a). The petition for a writ of certiorari in this Court was filed April 15, 1970.

In opposing that petition, we rely—as did the court below—on the comprehensive opinion of the district court, which made detailed findings of fact and conclusions of law in support of its determination of liability (Pet. App. A 2a-8a). We deem it appropriate, however, to respond to certain allegations petitioners develop in the petition.

1. As to the claim that the Federal Aviation Administrator chose the wrong statutory remedy, we note that this issue was only tangentially referred to in the district court and not raised before the court of appeals. In these circumstances, there is no reason for this Court to reach this contention. In any

[2] The maximum penalty under the statute is $1,000. At the government's suggestion at the conclusion of the evidence, the district court found that another line mechanic, Petsch, was not involved directly or indirectly in the violation and dismissed the case against him (Pet. App. A 7a-8a).

event, the Administrator is afforded wide statutory discretion as to the choice between the civil penalty of 49 U.S.C. 1471, invoked here, and the decertification procedures of 49 U.S.C. 1429,[3] which petitioners assert should have been employed. See 49 U.S.C. 1421. Because the latter procedure generally has a more drastic impact,[4] the civil penalty procedure is usually employed where, as here, the underlying violation is relatively less important.

2. Petitioners' principal contention is that the Administrator has improperly delegated authority to the air carriers by adopting regulations (14 C.F.R. 43.13(c)) which in effect adopt the maintenance manual procedures and techniques of a certificated air carrier or commercial operator as mandatory under the statute unless contrary notification is given. As the district court pointed out (Pet. App. A 6a-7a), the claim is insubstantial. The statute (49 U.S.C. 1421) empowering the Administrator to prescribe, *inter alia*, "[r]easonable rules and regulations

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[3] These provisions are set out in the Appendix to the Petition at pp. 11a-14a, 16a.

[4] If the Administrator had proceeded under Section 1429, he could have done so only as to petitioners Garrett and McDaniel (since they and not Walters were certificated mechanics); but the outcome for Garrett and McDaniel could have been withdrawal or cancellation of the individual licenses, which would have precluded them from working at their trade for so long as the Administrator deemed appropriate. Under the instant proceeding, petitioners were subjected to penalty but their licenses were in no way affected; they were thus not deprived of their status as licensed mechanics or the opportunity to work.

and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances," cannot be read as a direction that the Administrator *himself* issue the minute regulations required for maintenance and overhaul of different aircraft and their many parts. The delegation of this task to the air carriers themselves, which may be deemed to have great familiarity with the proper safety procedures for servicing their planes, is entirely reasonable. See Davis, *Administrative Law Treatise* §§ 2.01-2.07, 9.05, and cases cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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